Murugan a/l Arumugam v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–277 OF 2010
APANDI ALI, ALIZATUL KHAIR AND MOHTARUDIN BAKI JJCA
19 DECEMBER 2012

Criminal Procedure — Charge — Reduction of — Accused convicted under s 302 of the Penal Code for causing death of maid — Accused sentenced to death — Cause of deceased's death was spinal injury due to blunt force trauma with septicaemia due to right leg ulcer — Two possible causes of death — Whether there was evidence to show that accused caused spinal injury — Substantive cause of death — Whether charged should have been reduced to culpable homicide under s 304(a) of the Penal Code

Evidence — Dying declaration — Admissibility — Prosecution relied on circumstantial evidence to prove case — No eyewitness as to when and how accused caused spinal injury to deceased — Whether evidence of dying declarations made by deceased to six witnesses sufficient — General hearsay rule — Evidence Act 1950 s 32(1)(a)

In the High Court, the appellant was convicted under s 302 of the Penal Code ('Code') and sentenced to death for the offence of causing the death of his maid ('the deceased'). The deceased was violently assaulted resulting in her suffering spinal injury, fractured ribs and physical immobility. She was confined in a bathroom for two days and deprived of food and water, until she was rescued by the police and brought to the hospital. Having succumbed to her injuries, the deceased died six days later. The post mortem report revealed that the cause of her death was 'spinal injury due to blunt force trauma with septicaemia due to right leg ulcer'. The prosecution relied on circumstantial evidence, forensic and medical evidence and the dying declarations of the deceased to six difference prosecution witnesses to prove their case. In the present appeal, the appellant argued that there were two possible causes of death, ie spinal injury and septicaemia due to right leg ulcer. It was contended that there was no evidence to show that it was the appellant who had caused the spinal injury. According to the appellant, the charge should have been reduced to culpable homicide under s 304(a) of the Code. The appellant also submitted that the learned trial judge had mishandled the evidence of the appellant's wife ('PW21') by not impeaching her credibility and by not considering parts of the evidence of PW21 that were in favour of the appellant.

Held, dismissing the appeal:

(1) In analysing the cause of death, particularly where there was the

emergence of some other disease that could have contributed to the death, the court must look at what is termed as 'the operating cause' or 'the substantive cause' of the death. In this particular case, the 'spinal injury due to blunt force trauma' was the substantive cause of the death (see para 18).

(2) The prosecution relied on circumstantial evidence to prove its case and there was no eyewitness as to when and how the appellant had caused the spinal injury to the deceased. However, the evidence of dying declarations made by the deceased to the six witnesses was sufficient. A dying declaration is an exception to the general hearsay rule and is admissible under s 32(1)(a) of the Evidence Act 1950 and relevant whether the person who made it was or was not, at the time it was made, under expectation of death. Such dying declaration is admissible and relevant evidence if it relates to the cause of death or circumstances of the transaction which resulted in the death of the maker. The circumstances must have some proximate relation to the actual occurrence. The transaction must relate to a set of facts pertaining to the death of the maker such as the time or place of his death or about meeting someone who may be the accused. After perusing the dying declarations given by the victim in this case to the six witnesses, it was found that the dying declarations by the victim were rightly admitted as evidence (see paras 27–29).

(3) The learned trial judge was entitled to evaluate her evidence without impeaching PW21's credibility. An impeachment proceeding is at the behest of the party who is faced with a hostile witness. In the case in hand it would be by the prosecution. It was in the records of proceedings that the prosecution, after confronting the witness with her earlier written statement, had decided not to proceed further with any impeachment proceedings although there were some discrepancies in PW21's evidence (see para 33).

(4) The conviction of the appellant under s 302 of the Code was safe. The appellant had taken advantage of the deceased and had acted in a cruel and inhumane manner. The court agreed with the findings and conclusions of the High Court that it was the appellant who had caused the death of the deceased, in circumstances which amounted to murder under s 300 of the Code. There was no reason to justify the court to disturb the findings of facts by the learned trial judge. The learned trial judge had undertaken a proper evaluation and re-evaluation of the evidence as mandated under ss 180 and 182A of the Criminal Procedure Code (see paras 40–41).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu telah disabitkan di bawah s 302 Kanun Keseksaan ('Kanun') dan dihukum mati kerana kesalahan menyebabkan

kematian pembantu rumahnya ('si mati'). Si mati telah diserang dengan ganas mengakibatkannya mengalami kecederaan tulang belakang, tulang rusuk yang patah dan tidak dapat bergerak secara fizikal. Dia telah dikurung dalan bilik air selama dua hari dan tidak diberi makan dan air, sehingga dia diselamatkan oleh polis dan dibawa ke hospital. Enam hari kemudian si mati telah meninggal dunia akibat kecederaan yang dialaminya. Laporan post mortem menunjukkan bahawa punca kematiannya adalah 'spinal injury due to blunt force trauma with septicaemia due to right leg ulcer'. Pendakwaan bergantung kepada keterangan mengikut keadaan, forensik dan keterangan perubatan dan deklarasi-deklarasi kematian si mati kepada enam saksi-saksi pendakwaan yang berbeza untuk membuktikan kes mereka. Dalam rayuan ini, perayu berhujah bahawa terdapat dua sebab kematian, iaitu kecederaan tulang belakang dan septicaemia akibat ulser di kaki kanan. Adalah dihujahkan bahawa tiada keterangan yang menunjukkan bahawa perayu yang telah mengakibatkan kecederaan tulang belakang itu. Menurut perayu, pertuduhan itu patut dikurangkan kepada menyebabkan kematian tanpa sebab di bawah s 304(a) Kanun. Perayu juga berhujah bahawa hakim perbicaraan yang bijaksana telah menyalahgunakan keterangan isteri perayu ('PW21') kerana tidak mencabar kebolehpercayaannya dan kerana tidak mempertimbangkan bahagian keterangan PW21 yang menyebelahi perayu.

Diputuskan, menolak rayuan:

(1) Dalam menganalisas sebab kematian, khususnya di mana wujud penyakit lain yang boleh menyumbang kepada kematian itu, mahkamah perlu melihat apa yang diistilahkan sebagai 'the operating cause' atau 'the substantive cause' kematian itu. Dalam kes tertentu ini, 'spinal injury due to blunt force trauma' adalah sebab utama kematian itu (lihat perenggan 18).

(2) Pendakwaan bergantung kepada keterangan mengikut keadaan untuk membuktikan kesnya dan tiada saksi utama berhubung bila dan bagaimana perayu telah mengakibatkan kecederaan tulang belakang ke atas si mati. Walau bagaimanapun, keterangan berhubung deklarasi kematian yang dibuat oleh si mati kepada enam saksi adalah mencukupi. Deklarasi kematian adalah pengecualian kepada rukun dengar cakap am dan boleh diterimapakai di bawah s 32(1)(a) Akta Keterangan 1950 dan relevan sama ada orang yang membuatnya adalah pada atau tidak, pada masa ia dibuat, di bawah pengecualian kematian. Deklarasi kematian sedemikian adalah keterangan boleh diterima pakai dan relevan jika ia berkaitan dengan sebab kematian atau keadaan transaksi yang mengakibatkan kematian pembuat. Keadaan berikut perlu mempunyai kaitan rapat untuk kejadian sebenar berlaku. Transaksi itu hendaklah berkaitan dengan set fakta berhubung kematian pembuat seperti masa atau tempat kematian atau tentang pertemuan seseorang yang mungkin tertuduh. Setelah meneliti deklarasi kematian yang diberikan oleh si mati

dalam kes ini kepada enam saksi, adalah didapati bahawa deklarasi kematian oleh mangsa dengan wajar telah diterima sebagai keterangan (lihat perenggan 27–29).

(3) Hakim perbicaraan yang bijaksana berhak menilai keterangan beliau tanpa mencabar kebolehpercayaan PW21. Prosiding mencabar adalah di pihak yang menghadapai saksi yang menentang. Dalam kes ini ia adalah pendakwaan. Adalah dalam rekod prosiding bahawa pendakwaan, selepas berdepan dengan saksi berhubung kenyataan terdahulunya, telah memutuskan untuk tidak meneruskan selanjutnya dengan apa-apa prosiding mencabar walaupun terdapat percanggahan dalam keterangan PW21 (lihat perenggan 33).

(4) Sabitan perayu di bawah s 302 Kanun adalah selamat. Perayu telah mengambil kesempatan ke atas si mati dan bertindak kejam dan tidak berperikemanusian. Mahkamah bersetuju dengan penemuan dan kesimpulan Mahkamah Tinggi bahawa perayulah yang telah mengakibatkan kematian si mati, dalam keadaan yang membentuk kematian di bawah s 300 Kanun. Tiada sebab untuk mewajarkan mahkamah mengganggu penemuan fakta oleh hakim perbicaraan yang bijaksana. Hakim perbicaraan yang bijaksana telah menjalani penilaian wajar dan penilaian semula keterangan sebagaimana dimandatkan di bawah ss 180 and 182A Kanun Acara Jenayah (lihat perenggan 40–41).]

Notes

For cases on admissibility, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1512–1521.

For cases on reduction of, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1545–1546.

Cases referred to

Ayoromi Helen v PP [2005] 1 MLJ 699, CA (refd)
Balakrishnan v PP [2005] 4 SLR 249, HC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Chan Phuat Khoon v PP [1962] 1 MLJ 127, CA (refd)
Chandmal & Anor v State of Rajasthan AIR 1970 SC 917, SC (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
D Yohannan v State of Kerala AIR 1958 Ker 207 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306; [1982] CLJ 464, FC (refd)
Leong Siong Sun & Anor v PP [1985] 2 CLJ 250, HC (refd)
Loganatha Venkatesan & Ors v PP [2000] 3 SLR 677, CA (refd)
Megat Halim bin Megat Omar v PP [2008] MLJU 647; [2009] 1 CLJ 54, CA (refd)
Ng Keng Yong v PP and another appeal [2004] 4 SLR 89, HC (refd)

A *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, PC (folld)
Pakala Narayana Swami v King-Emperor [1939] 8 MLJ 59, PC (refd)
PP v Awang Abdul Rahman [1982] 1 MLJ 346 (refd)
B *PP v Ee Boon Keat* [2006] 2 MLJ 633, HC (refd)
PP v Megat Shahrizat bin Megat Shahrur [2011] MLJU 502; [2011] 5 CLJ 608, FC (distd)
PP v Tan Chye Joo & Anor [1989] 2 MLJ 253, HC (refd)
R v Smith [1959] 2 QB 35 (refd)
C *Tan Kim Ho & Anor v PP* [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465, SC (folld)

D **Legislation referred to**
Criminal Procedure Code ss 112, 180, 182A
Evidence Act 1950 ss 32(1)(a), 154
Penal Code ss 300, 300(c), 302, 304(a)

E **Appeal from:** Criminal Trial No 45B-170 of 2007 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.
F

Apandi Ali JCA:

INTRODUCTION

G

[1] The appellant was convicted for the offence of murder, to wit, causing the death of his Indonesian maid, under s 302 of the Penal Code and sentenced to death.

H

[2] The charge against the appellant, at the High Court, reads as follows:

> Bahawa kamu di antara 18 Oktober 2009 hingga 20 Oktober di No. 11 Jalan Dato' Yusof Shahbudin 6, Taman Sentosa di dalam daerah Klang di dalam Negeri Selangor Darul Ehsan, telah membunuh Muntik (No. Pasport: AK 07947) dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.
I

[3] On appeal to this court, we dismissed the appellant's appeal and affirmed

the conviction and sentence. Now, we shall give our reasons for having done so.

FACTUAL BACKGROUND

[4] Upon reading the evidence of the 50 witnesses for the prosecution it is obvious that the prosecution relied on circumstantial evidence, forensic and medical evidence and the dying declarations of the deceased (to six difference prosecution witnesses) to prove their case.

[5] The facts of the case are well set out in a well-written grounds of judgment by the learned trial judge. We do not intend to repeat them. Suffice for us to summarise that this is an unfortunate tragedy for the deceased who in a proverbial saying: 'jumped out of a frying pan into the fire'. The salient facts as unfolded are that: the deceased, Muntik, ran away from her former employer and sought shelter at the house of the appellant while waiting for her husband to arrange for her departure from this country. However during her stay at the appellant's house, she was violently assaulted resulting in her suffering spinal injury, fractured ribs and physical immobility. She was confined in a bath room for two days without food and water, until she was rescued by the police and brought to the hospital. However she succumbed to her injuries and died six days later. The cause of death, according the post-mortem report ('P68'), was due to 'spinal injury due to blunt force trauma with septicaemia due to right leg ulcer'.

THE APPELLANT'S CONTENTIONS

[6] Learned counsel for the appellant, En Hisyam Teh Poh Teik, in his usual to-the-point manner canvassed two grounds only:

(a) that the totality of the evidence did not disclose an offence of murder; and

(b) that the learned trial judge had mishandled the evidence of SP21 (the appellant's wife).

[7] We shall respectively deal with the two grounds raised by the appellant.

First ground

[8] Learned counsel for the appellant argued that there are two possible causes of death, ie (a) spinal injury and (b) septicaemia due to right leg ulcer. Learned counsel referred to us the evidence of SP36, Dr Norliza bt Ibrahim, the medical forensic specialist, in particular what was recorded at p 615 of appeal records, which reads as follows:

S84 Boleh jelaskan dengan lebih lanjut mengenai punca kematian tersebut

dan kaitannya dengan kecederaan yang dialami di bahagian belakang dan jangkitan kuman akibat ulser kaki kanan?

J Saya berpendapat bahawa apabila mangsa mengalami patah tulang belakang, beberapa komplikasi telah timbul. Didapati dalam bedah siasat si mati mengalami kecederaan pada saraf tunjangnya yang menyebabkan beliau lumpuh dari paras T12 ke bawah. Seseorang yang lumpuh akan mengalami beberapa komplikasi akibat kecederaan itu antara lainnya termasuk wujudnya ulser tekanan yang boleh menyebabkan keradangan (keradangan pada kaki kanan simati) dan jangkitan, luka lambat sembuh, menyebabkan masalah peredaran darah seperti yang dialami oleh si mati. Ini semua boleh menyebabkan kematian nya.

[9] Learned counsel also submitted that there was no evidence to show that it was the appellant who caused the spinal injury.

[10] In support of his contention on this ground, learned counsel relied heavily on a recent Court of Appeal decision in the case of *Public Prosecutor v Megat Shahrizat bin Megat Shahrur* [2011] MLJU 502; [2011] 5 CLJ 608 and quoted p 620 of the citation, which reads as follows:

> Although SP7's evidence provided the narrative which unfolded the events taking place in the hall of the condominium on the material date and time, there was no evidence to show how long Megat had sat on Shahira, the degree of force applied by Megat as well as the exact position of Shahira when the force was applied on her. Those elements, if established by evidence would surely had assisted the learned trial judge in determining whether the fatal injuries were intended by Megat. However, SP7's evidence did not reveal those vital elements which the learned trial judge was looking for.

[11] In line with that authority, learned counsel submitted that the case against the appellant should have been reduced to culpable homicide, under s 304(a) of the Penal Code and not for murder.

Second ground

[12] Learned counsel for the appellant submitted that the learned trial judge had mishandled the evidence of PW21, the wife of the appellant; namely in not impeaching her credibility.

[13] Learned counsel submitted that the learned judge did not consider those parts of the evidence of PW21 that were in favour of the appellant. For example, learned counsel cited the one at p 365 of the appeal record, which reads:

> S34 Apa yang dia beritahu kamu bila dia datang ke rumah kamu?

J Dia beritahu saya bahawa dia lari daripada rumah orang Cina kerana majikan dera dia. Dia minta tumpang 2 minggu di rumah saya dan lepas itu akan keluar dari rumah kami.

[14] Also at p 391, which reads:

S86 Rujuk muka Muntik. Apa sebab muka Muntik jadi macam dalam gambar. Apa menyebabkannya?

J Separuh kesan daripada mukanya sudah ada sebelum dia datang ke rumah saya.

[15] Also at p 395, which reads:

S106 Semasa dalam ambulans bersama anggota ambulans dan Muntik, apa yang berlaku di dalam ambulans itu?

J Lelaki berada di dalam ambulans itu tanya kepada saya 'kenapa kakak kepala Muntik botak'. Saya beritahu kepada bahawa suami saya yang membotakkan kepalanya. Lepas itu lelaki itu tanya kakinya luka. Saya beritahu kerana ada bisul dan dia tidak jaga kakinya jadi macam itu. Beliau tanya kenapa muka Muntik sebegini. Saya beritahu luka-luka yang berwarna hitam sudah ada sebelum dia datang ke rumah saya dan di bahagian pipi suami yang pukul. Lepas itu sampai ke hospital.

[16] Also at p 409, which reads:

Put Pada masa dia datang itu adalah bulan puasa?

J Setuju.

Put Semasa beliau masuk ke rumah kamu dan minta perlindungan kerana dia didera oleh majikan lama. Semasa dia datang itu ada bisul besar di kaki kiri?

J Saya setuju.

OUR ANALYSIS AND FINDINGS

[17] On the cause of death, it is without doubt that what was in evidence is that death is due to: 'spinal injury due to blunt force trauma with septicaemia due to right leg ulcer'.

[18] It is our judgment in analysing the cause of death, particularly where there is the emergence of some other disease that could have contributed to the death, the court must look at what is termed as 'the operating cause' or 'the substantive cause' of the death. In this particular case we are of the view that the 'spinal injury due to blunt force trauma' was the substantive cause of the death.

The words used by SP36 to describe the cause of death is by itself self-explainatory. She did not say the cause of death is due 'to septicaemia due to the right leg ulcer'. This in fact was explained at length by SP36 (at p 616 of the appeal record) where she said as follows:

> S86 Adakah kecederaan-kecederaan yang dialami oleh si mati dalam keadaan yang biasa boleh menyebabkan kematian?
>
> J Dalam keadaan-keadaan biasa patah tulang belakang seperti yang dialami boleh menyebabkan kematian tetapi selalunya bukan serta merta. Seseorang yang patah tulang belakang seperti si mati akan mati apabila komplikasi timbul. Mereka kebanyakannya mati akibat jangkitan kuman, jangkitan paru-paru dan sebagainya. Telah diketahui berdasarkan kajian oleh pakar luar negara dalam bidang tersebut bahawa jika seseorang tidak diberi rawatan awal selepas daripada mengalami kecederaan saraf tunjang, risiko untuk seseorang itu mati akibat komplikasi kecederaan adalah lebih tinggi berbanding bagi mereka yang menerima rawatan awal.

[19] This substantive cause test was first highlighted in the English case of *R v Smith* [1959] 2 QB 35. In that case, in the course of a fight between soldiers of different regiments, D stabbed V twice with a bayonet. One of V's comrades, trying to carry V to the medical reception station, twice tripped and dropped him. At the reception station the medical officer, who was trying to cope with a number of other cases, did not realise that one of the wounds had pierced a lung and caused hemorrhage. He gave V treatment which, in the light of the information regarding V's condition available at the time of trial, was 'thoroughly bad and might well have affected his chances of recovery'. D's conviction of murder was upheld and counsel's argument, that the court must be satisfied that the treatment was normal, and that this was abnormal, was brushed aside. In the course of his judgment Lord Parker CJ laid down the test (at p 42) as follows:

> … if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

[20] This substantive cause test was adopted in Singapore, in the case of *Ng Keng Yong v Public Prosecutor* [2004] 4 SLR 89 which was later reaffirmed in *Balakrishnan v Public Prosecutor* [2005] 4 SLR 249. In Malaysia, it was applied by Justice Peh Swee Chin in *Leong Siong Sun & Anor v Public Prosecutor* [1985] 2 CLJ 250.

[21] On this issue, it may be pertinent to reflect on what was said by Raman Nayar J in *D Yohannan v State* AIR 1958 Kerala 207 at p 210, which reads as follows:

> There is no indication of any unexpected intervention, and as observed by Mayne at p 469 of his *Criminal Law of India*, (4th Ed), 'any act is said to cause death within the meaning of s 299, when the death results either from the act itself or from some consequences necessarily or naturally flowing from that act, and reasonably contemplated as its result'. Where without the intervention of any considerable change of circumstances the death is connected with the act of violence by a chain of causes and effects, the death must be regarded as a proximate and not too remote a consequence of the act of violence.

[22] On whether the appellant in the appeal before us was responsible for the natural or necessary consequences of his act, we are guided by what was said by Viscount Simonds in the Privy council case of *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, at p 423, which reads as follows:

> If it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or a similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.

[23] Although the pronouncement was made in a civil case involving the tort of negligence, that test is equally applicable to an enquiry under the criminal law (see '*Criminal Law in Malaysia and Singapore*', (2nd Ed), by Stanley Yeo, Neil Morgan and Chan Wing Cheong; at p 123).

[24] In other words, the appellant's act of causing the spinal injury is the *sine qua non* of the prohibited consequence, ie the death of the deceased.

[25] It is also our judgment that the offence of murder in this appeal falls within the definition of s 300(c) of the Penal Code, which reads:

> 300. Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (a) …
>
> (b) …
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

[26] The witness, SP36 has testified, as quoted above, to that effect. On this

point, perhaps it is appropriate to apply the test as laid down by V Bose J in *Virsa Singh v State of Punjab* AIR 1958 SC 465 at p 467, where His Lordship said:

> ln considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that 'twelve good men and true' could readily appreciate and understand.
>
> First, it must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.
>
> Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300 'thirdly'. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.

[27] In this appeal, the prosecution relied on circumstantial evidence to prove its case. There is no eyewitness as to when and how the appellant had caused the spinal injury to the deceased. But there are other sufficient evidence.

[28] There are the evidence of dying declarations made by the deceased to six witnesses. A dying declaration is an exception to the general hearsay rule and is admissible under s 32(1)(a) of the Evidence Act 1950; which reads as follows:

> (1) Statements, written or verbal, of relevant facts made by a person *who is dead* or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

[29] A dying declaration under s 32(1)(a) is relevant whether the person who made it was or was not, at the time it was made, under expectation of death. The statement can be either oral or written. Such dying declaration is admissible and relevant evidence if it relates to the cause of death or circumstances of the transaction which resulted in the death of the maker. The circumstances must have some proximate relation to the actual occurrence. The transaction must relate to a set of facts pertaining to the death of the maker such as the time or place of his death or about meeting someone who may be the accused (see judgment of Lord Atkin in *Pakala Narayana Swami v King-Emperor* [1939] 8 MLJ 59).

[30] We are also mindful of the need to apply our mind to the credibility of the dying declarations of the victim in this appeal. We are so reminded by the case of *Chan Phuat Khoon v Public Prosecutor* [1962] 1 MLJ 127 where Thomson CJ posed the chilling questions: 'Did that voice from beyond the grave speak the truth? Was it to be relied upon?'

[31] After perusing the dying declarations given by the victim in this case to six witnesses, namely:

(a) PW2, Gerald Lazarus, a practising lawyer; who said:

> I don't know who told her that I was the one who made the report. But she held my hand and told me 'terima kasih' and kissed my hand. I asked her 'siapa yang buat'. She said 'tuan yang buat'. I then left the emergency ward.

(b) PW6, Muhamad Sahid bin Abdul Karim, the assistant medical officer who was in the ambulance that took the victim to the hospital, and whose evidence reads as follows:

> S51 Adakah kamu bercakap dengan mangsa tentang kecederaan yang dialami?

J Saya ada tanya siapa yang pukul. Pembantu rumah berulang kali cakap, 'takut untuk beritahu'. Selepas dipujuk baru dia beritahu 'majikan yang pukul' tetapi saya tidak tahu majikan lelaki atau perempuan.

(c) PW14, Insp Mohd Azan, the investigating officer who recorded a statement from the victim under s 112 of the Criminal Procedure Code, and it was tendered and marked as exh P78. Besides P78, PW14 also gave evidence as follows:

> Saya tanya dia macam mana boleh jadi macam ini. Dia kata dia kena pukul. Saya tanya siapa yang pukul. Dia beritahu saya, 'bapak'. Peguam En. Gerard pun ada tanya. Dia jawab 'tuan'.
>
> Saya dapati perempuan ini berada dalam keadaan yang lemah. Cakap pun slow. Saya tanya dia, 'siapa nama kamu'. Dia kata 'Muntik binti Hani'. Saya tanya lagi 'kenapa kaki kamu boleh jadi macam ini'. Dia beritahu saya dia kena pukul dengan bapak. Saya tanya mangsa 'kena pukul dengan apa'. Dia kata, yang dekat betis itu kena pukul dengan besi. Selepas itu saya tanya dia tangan kamu berlipat macam ini kena pukul dengan apa' dia kata 'dengan batang penyapu'.'
>
> Pada masa itu keadaan dia agak lemah. Saya tanya dia lagi siapa yang pukul kamu. Dia beritahu saya bapak majikan lelaki dia. Dengan apa, dia cakap dengan besi. Lepas itu saya tanya majikan perempuan dia ada pukul dia. Dia kata kakak tidak pukul.
>
> Saya tanya berapa lama dia sudah berada di Malaysia. Dia kata sudah 5 tahun. Saya tanya macam mana dalam tempoh 5 tahun dia boleh masuk dan berada di Malaysia. Lepas itu dia beritahu saya dia bekerja dengan satu perempuan Cina. Saya tanya dia siapa perempuan Cina itu dan di mana dia tinggal. Dia beritahu saya, saya tidak faham dia cakap apa. Saya tanya berapa lama dia dikurung dalam bilik air. Dia kata tidak silap 2 hari 2 malam.
>
> Selepas itu saya tanya macam mana kamu boleh berada dalam bilik air. Dia kata bapak angkat dia letak dalam bilik air.
>
> Saya tanya lagi macam mana kamu boleh dapat kecederaan di bahagian kaki. Dia beritahu saya dia dipukul dengan besi. Saya tanya besi macam mana, bagaimana bentuk besi itu. Dia ada beritahu saya tetapi saya tidak faham, sebab dia cakap perlahan.

PW14 also recorded what was said by the victim in his official diary and it was produced and marked as exhs P14 and P14A.

(d) PW39, Dr Shujahtaa a/p MP Rajoo, a medical officer attached to Emergency Department in Hospital Tunku Ampuan Rahimah, Klang, whose evidence reads as follows:

> S50 Adakah pesakit menceritakan apa-apa kepada Dr. semasa itu?
>
> J Ya.

S51 Apakah yang diceritakan oleh pesakit itu kepada Dr.?

J Dia mengatakan bahawa majikan lelaki India telah memukulnya berulang kali dengan kayu. Tumbuk dan tendang ke bahagian perut, belakang dan mukanya. Dua bulan dia tinggal dengan majikan baru itu dan dipukul oleh majikan itu. Dia juga beritahu bahawa dia telah dibotakkan oleh majikan lelaki India itu.

Dia juga mengatakan bahawa majikan lelakinya juga telah memukul kakinya dengan besi dan disimbah air panas. Selain itu, dia telah mengatakan bahawa dia telah dikurung dalam tandas dan tidak makan selama 2 hari. Saya juga tanya dia adakah dia dirogol oleh majikan lelaki dan diberitahu tidak.

(e) PW42, Dr Dinesh a/l Earnest Kunasingh, a medical officer attached to the Orthopedic Department of the same hospital, whose evidence reads as follows:

S46 Adakah pesakit menceritakan apa-apa kepada Dr. semasa itu?

J Yes.

S47 Apakah yang diceritakan oleh pesakit itu kepada Dr.?

J Patient spoke in Malay. She had been working in Malaysia for 4 years. Currently works in a household of 4 people, (husband, wife, child and husband's mother). Stays in a single storey house. Alleged abuse by employer (the husband). Denied physical abuse by anyone else. Sustained multiple injuries for past 1 month to the face, lower back and lower limbs, injuries started in October. Alleged assault with metal object and broom. Allegedly locked up in bathroom for past two days with reduced oral intake.

S48 Adakah Dr. ada mencatitkan di mana-mana cerita yang diberikan oleh pesakit itu?

J Patients history was documented in the patient's file.

The witness, PW42 also made a note of the conversation and it was recorded in the patient's file. The notation was produced and marked as exh P7.

(f) Lastly, PW43, Dr Urcilla Jaya, a houseman at the same hospital and who accompanied PW39 in the examination of the patient and who was instructed to record the narration of the patient as to the causes of her injuries. It was a very brief note and it was recorded in the case note of the patient. The brief note was produced and marked as exh P74;

we are of the considered view that the dying declarations by the victim were rightly admitted as evidence.

[32] That being so, we find that the facts and the evidence in the case relied

upon by the appellant, ie *Megat Shahrizat* are different from those in this appeal. As such we find that there is no merit in the first ground canvassed by the appellant.

[33] On the second ground of the mishandling of the evidence of PW21, we are of the view that the learned trial judge is entitled to evaluate her evidence without impeaching her credibility. An impeachment proceeding is at the behest of the party who is faced with a hostile witness. In the case in hand it would be by the prosecution. It is in the records of proceedings that the prosecution, after confronting the witness with her earlier written statement, had decided not to proceed further with any impeachment proceedings (see p 399 of the appeal records). A questioning of one's own witness under the provisions of s 154 of the Evidence Act 1950 need not necessarily end up with an impeachment of the credibility of the witness. This is in line with the maxim: '*cujus est institucre ejus est abrogare*' (He that institutes may also abrogate). See also *Loganatha Venkatesan & Ors v Public Prosecutor* [2000] 3 SLR 677.

[34] Having said so, although there are some discrepancies in PW21's evidence, in the light of the prosecution not pursuing further with any impeachment, it is our judgment that it is within the learned trial judge's discretion to evaluate PW21's evidence. There is no reason to reject her evidence in toto. The learned trial judge is entitled to reject part of PW21's evidence and accept the others upon careful consideration and after testing with all other available evidence adduced at the trial. On this point we refer to: *Tan Chye Joo & Anor* [1989] 2 MLJ 253 at p 255, which held that:

> The object of the cross-examination under s 154 of the evidence act is only to test the veracity of the witness. The grant of the permission to cross-examine is not an adjudication by the court adverse to the veracity of the witness. Whether the testimony of the witness should be rejected in whole or in part depends on the result of the cross-examination.

[35] As such, we find that the appellant's second ground is also without any merit.

CONCLUSION

[36] As we had stated earlier, in this case the prosecution relied on circumstantial evidence and that being so, we have to adequately caution ourselves, in line with what was said in *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307:

> … what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner.

[37] In the course of doing so, we had also evaluated all the evidence adduced at the trial. Upon such evaluation, we find that in the factual circumstances of the case, it was the appellant who have had the opportunity to cause the spinal injury to the deceased. We also took into consideration the evidence of PW11, the former employer of the deceased and that of the neighbours of the appellant, such as PW2, PW22, PW23, PW29 and PW30 who testified as to the condition of the deceased before she was discovered by PW3 while she was locked in a toilet in the appellant's house on 20 October 2009. There is also the evidence of the appellant being a hot-tampered person who often bashed his wife. This is evidence in the police reports (exhs P53, P54 and P55) made by the appellant's wife, PW21 in the months of June–July 2009.

[38] In his defence, the appellant merely denied assaulting the deceased. There was no real plausible reason or explaination as to why the deceased was locked-up in the toilet without food and water for two days. On being questioned by the learned deputy public prosecutor as to why he did not take the deceased to the hospital for treatment, the appellant gave a lame excuse that the deceased refused to go to the hospital because she had not passport with her. We paused here, to recapitulate and recalled that there was no such suggestion by the appellant during the cross-examinations of the prosecution witnesses. That omission, to our mind does diminish the credibility of the defence story. On this issue, we refer to and rely on the following case law:

(a) *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29;

(b) *Public Prosecutor v Awang Abdul Rahman* [1982] 1 MLJ 346;

(c) *Megat Halim bin Megat Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 54;

(d) *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699;

(e) *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236;

(f) *Public Prosecutor v Ee Boon Keat* [2006] 2 MLJ 633; and

(g) *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733.

[39] Coming back to circumstantial evidence in this case, we find that all other possibilities pertaining to the injuries sustained by the deceased has been eliminated. It is our judgment that all the available evidence had unerringly pointed to the guilt of the appellant. We are satisfied that the guilt of the appellant had been proven beyond reasonable doubt (see *Jayaraman & Ors v*

A *Public Prosecutor* [1982] 2 MLJ 306; [1982] CLJ 464; *Chandmal & Anor v State of Rajasthan* AIR 1970 SC 917 and *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10).

B **[40]** On the facts of the case, we find that the appellant had taken advantage of the deceased and had acted in a cruel and inhumane manner. We also agree with the findings and conclusions of the High Court that it was the appellant who had caused the death of the deceased, in circumstances which amounted to murder under s 300 of the Penal Code. Whatever contentions by the appellant in this appeal are in respect of findings of facts by the learned trial
C judge. We could not find any reason to justify us to disturb the findings of facts by the learned trial judge. The learned trial judge had undertaken a proper evaluation and re-evaluation of the evidence as mandated under ss 180 and 182A of the Criminal Procedure Code.

D **[41]** For the above reasons, we find that the conviction of the appellant for an offence under s 302 of the Penal Code is safe. On that note, we unanimously dismissed the appeal by the appellant. Accordingly the conviction and sentence imposed by the High Court is hereby affirmed.

E *Appeal dismissed.*

Reported by Afiq Mohamad Noor

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